IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 20240 of 2005

For Approval and Signature:

HONOURABLE MR.JUSTICE D.A.MEHTA Sd/-

HONOURABLE MS.JUSTICE H.N.DEVANI Sd/-

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?
2	To be referred to the Reporter or not ?
3	Whether their Lordships wish to see the fair copy of the judgment ?
4	Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?
5	Whether it is to be circulated to the civil judge ?

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BARODA RAYON CORPORATION LTD & 1 - Petitioner(s)
Versus
UNION OF INDIA & 3 - Respondent(s)

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Appearance :
MR SN THAKKAR for Petitioner(s) : 1 - 2.
DS AFF.NOT FILED (N) for Respondent(s) : 1 - 4.
MR JITENDRA MALKAN for Respondent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE D.A.MEHTA
and
HONOURABLE MS.JUSTICE H.N.DEVANI
Date : 27/10/2005

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE D.A.MEHTA)

1 Heard Mr.S.N.Thakkar and Mr.Jitendra Malkan, appearing on behalf of the petitioners and respondents respectively.

2 Rule.Mr.Malkan waives service of Rule. The petition is taken up for final hearing and disposal today as the controversy lies in a narrow compass.

3 This petition primarily challenges order dated 8/7/2003 (Annexure-J) and order dated 8/10/2004 (Annexure-M) made by the Customs, Excise and Service Tax Appellate Tribunal(CESTAT), West Zonal Bench, Mumbai in the following circumstances.

4 The petitioner, a Limited Company, claimed modvat credit in relation to various capital goods by filing a declaration under Rule 57Q of the Central Excise Rules,1944 (the Rules) on 3/10/1994. Sometime in February,1995 during course of audit, Superintendent of Central Excise conveyed to the the petitioner by communication dated 18/2/1995 that one of the declarations for modvat credit amounting to Rs.72,900/- was in relation to an 'input' viz. copper chromate catalyst which was not an item of capital goods and hence the same was remitted so as to enable the petitioner to avail the credit under Rule 57G of the Rules. Accordingly, necessary declaration under Rule 57G of the Rules came to be filed on 25/4/1995 and the petitioner availed the credit vide Entry No.767 in RJ 23,Part-II on 11/7/1995 as 'input'.

5 Show cause notice dated 15/1/1996 came to be

served on the petitioner calling for an explanation as to why such credit availed should not be recovered as the claim was beyond the prescribed period of limitation. The assessee's explanation tendered on 28/2/1996 was not found to be acceptable and an Order-in-Original came to be made on 29/10/1996. The assessee-petitioner failed in its appeal before Commissioner (Appeals) and hence, preferred Second Appeal before CESTAT.

6 The appeal came to be heard and disposed of by CESTAT vide its order dated 8/7/2003 after rejecting the request for adjournment. According to CESTAT, the ground taken in the appeal that the notice was beyond the period of six months from the date of duty paying document was incorrect as notice had been received within period of limitation because the period of six months had to be reckoned from 5/8/1995. The

Tribunal accordingly dismissed the appeal.

7 The petitioner moved an application seeking rectification of order dated 8/7/2003 on the ground that there was an apparent error committed by the Tribunal while passing the order on 8/7/2003. The said application came to be rejected by CESTAT vide order dated 8/10/2004 by recording as under :

> "2. I have heard both sides. The plea of the appellants is that they took credit initially on 29.7.94, and at the instance of the Department, transferred the credit from capital goods category to inputs category and Rule 57I as stood during the period when credit was initially taken provided for computation of limitation from the date of taking credit. I am not able to accept this plea for the reason that it was not raised in the appeal memorandum and further the applicants have not offered any explanation for their non appearance on the date fixed for hearing when this point could have been urged before the Bench. Therefore, there is no merit in the application, which is accordingly dismissed".

8 As can be seen from the aforesaid order made on Rectification of Mistake Application, CESTAT has proceeded on the footing that the plea that the credit was initially taken along with certain other capital goods and transferred at the instance of the department to the category of inputs was not borne out from the record as according to the Tribunal such a ground was never raised before it in the appeal proceedings.

9 Aforesaid statement is not only contrary to the record but goes against the order made by the Tribunal itself while deciding the Stay Application moved by the petitioner. In the memorandum of Appeal filed before the Tribunal in the statement of facts the following averments appear :

> “While submitting a declaration for 17 items

for Modvat credit, the appellant had wrongly included Copper Chromate Catalyst also with the other 16 items which were capital goods and had taken Modvat credit of the duty paid in R.G.23C in October,1994.

The Superintendent of Central Excise (Audit) while auditing the records in February,1995 pointed out that the Catalyst in question does not come under Capital Goods and so the appellant could not take credit as Capital Goods under Rule 57Q. Therefore, the Modvat credit under Rule 57Q was reversed and credit was taken in July, 1995 after submitting a fresh declaration on 17.6.95."

In the grounds of appeal the following ground is taken by the petitioner :

"There are many number of orders issued by different Benches of the Tribunal that a substantive benefit should not be denied for a procedural defect. In this case, the declaration could not be submitted within the period of six months prescribed in Rule 57(5) because the appellant had originally submitted declaration including this item also along with the other 16 items which were Capital Goods. This was within the prescribed period. It was only after the Superintendent (Audit) pointed out the mistake,

> the appellant could submit correct declaration as inputs".

10 When the application for waiver of duty and penalty came up before the Tribunal this is what was recorded by the Tribunal in its order dated 13/1/1999.

> "xxx xxx Originally it would appear that the appellant had taken the modvat credit under Rule 57Q. Later on it would appear as per the advice of the Excise authorities, they had taken the modvat credit under Rule 57A. The department felt there has been a procedural irregularity in claiming the modvat credit. The fact whether in this case there has been substantial compliance or non-compliance of procedural irregularity at the time of final hearing. However, prima facie there appears to be a arguable case for the appellant".

11 Even if one accepts that the proceedings relating to stay/waiver had been disposed of and did not form part of the appeal proceedings the facts show that the assessee had categorically made a statement of fact and raised a specific

ground in the Memorandum of Appeal filed before the Tribunal. It is not necessary for the Court to consider as to whether the appeal was rightly decided ex-parte or not, suffice it to state that, even if the Tribunal wanted to proceed ex-parte it was incumbent upon it to peruse its own record before framing the order.

12 The Tribunal having lost sight of the averments made in the statement of facts and the grounds raised before it, the petitioner moved an application seeking rectification of its order dated 8/7/2003. It belies comprehension as to how the Tribunal while dealing with the same could have observed that the aforesaid plea was not raised in the appeal memorandum. Either it is as a result of total non application of mind on part of the Tribunal, or it is as a result of the Tribunal feeling shy to accept that it had committed an error apparent on record. In either

of the eventualities order of the Tribunal stands vitiated because of the legal infirmity: viz non application of mind or non acceptance of the fact that there exists an error apparent on record. It is necessary that the Tribunal realises that it commands respect not only because of quick disposal of matters before it but also because quick disposal is coupled with substantial justice. The Tribunal cannot have as its goal only quick disposal at the cost of justice.

13 There is one more aspect of the matter. While dismissing the ROM Application the Tribunal has stated that the applicant had not offered any explanation for non appearance on the date fixed for hearing of the appeal when the point could have been urged before the Bench. This approach of the Tribunal cannot be said to be in consonance with the principles of natural justice as well as in consonance with the

record. As can be seen from order dated 8/7/2003 made by the Tribunal while dismissing the appeal it has been recorded that the petitioner had made a request for adjournment which was not granted as the matter had already been adjourned earlier in point of time at the request of the appellant-petitioner. Therefore, for the Tribunal to hold the factum of non appearance as a ground for not deciding the issue on merits cannot be upheld. The Tribunal must appreciate that when an appeal is being decided exparte the responsibility is greater and the Tribunal must carefully go through the entire record before arriving at any finding which is adverse to the party who is not represented. The Tribunal cannot shift the onus on the person who is absent. It could have dismissed the appeal for want of prosecution, but if it wanted to proceed on merits, it was necessary to take into account all the contentions which were not only raised

before it in the memorandum of appeal but also such connected contentions which might be available to the party which is absent.

14 In the present set of circumstances, the facts as well as the record reveal that the impugned order of Tribunal dated 8/10/2004 (Annexure-M) cannot be permitted to stand. The same is quashed and set aside. The Court having come to the conclusion there exists an error apparent on record, it would be in the fitness of things, if the Rectification of Mistake Application is accepted and original order dated 8/7/2003 made in the appeal is, as a consequence quashed and set aside so as to restore the appeal to the file of the Tribunal.

15 Accordingly, Rectification of Mistake Application is granted and final order

No.C.II/1814/03-WZB dated 8/7/2003 is quashed and set aside. As a consequence Appeal No.E/3140/98-BOM is restored to file. CESTAT shall decide the appeal afresh after giving proper and reasonable opportunity of hearing to the parties before it.

16 In the result, the petition is allowed. Rule made absolute. There shall be no order as to costs.

Sd/- Sd/-
(D.A.Mehta, J) (H.N.Devani, J)

m.m.bhatt